No. 07-73851

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA MASON MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board ("the Board") had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)) because the unfair

labor practices occurred in Winslow, Washington. The Board's Decision and Order issued on August 21, 2007, and is reported at 350 NLRB No. 73. (ER 43-60.)[1] The Board's Order is a final order under Section 10(e) and (f) of the Act.

Virginia Mason Medical Center ("the Center") filed its petition for review of the Board's Order on September 28, 2007. The Board filed its cross-application for enforcement on October 31, 2007. Both filings were timely, as the Act places no time limitation on filing for review or enforcement of Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union during the certification-year period.

STATEMENT OF THE CASE

Acting on a charge filed by United Staff Nurses Union Local 141 a/w United Food & Commercial Workers International Union, CLC ("the Union"), the Board's General Counsel issued a complaint, alleging that the Center had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by, among other

[1] "ER" refers to the record materials contained in the "Excerpts of Record" filed with the Center's brief. "Tr" references are to the transcript of proceeding before the administrative law judge. "GCX" and "RX" are references to the exhibits of the General Counsel and the Center admitted at that hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

things, counseling and issuing a written warning to employee Jeanette Rerecich, and by withdrawing recognition from the Union during the certification year. (ER 43.) The Center filed an answer, then an amended answer, admitting in part and denying in part the allegations in the complaint, and raising certain affirmative defenses. (ER 46.)

An administrative law judge conducted a hearing on the allegations raised by the pleadings, dismissed certain of the complaint's allegations, and concluded, as relevant here, that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by counseling and warning Rerecich, and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union during the certification year. The Center filed exceptions to the judge's determination that it violated Section 8(a)(5) and (a)(1) of the Act by withdrawing recognition from the Union. However, the Center did not except to the judge's determination that the Center violated Section 8(a)(1) of the Act by counseling and warning Rerecich. The Board considered the Center's exceptions and decided to affirm the judge's decision and to adopt his recommended order with modifications. (ER 43, 45-46.) On October 11, 2007, pursuant to the motion of the General Counsel, the Board corrected its Order to conform it to the relief requested in the complaint.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Center operates a number of health care facilities in the Puget Sound area, one of which is located in Winslow on Bainbridge Island. Only that facility is involved in these proceedings. (ER 47; Tr 166.)

On September 8, 2000, the Union filed a representation petition seeking to represent certain employees at the Center. On October 19, 2000, the Regional Director directed an election in a unit consisting of "all registered nurses and all other professional employees employed by the [Center] at its Winslow (Bainbridge Island) facility, but excluding all physicians, all nonprofessional employees, and guards and supervisors as defined by the Act." (ER 43, 48; GCX 1(e), 1(g).)

The Center sought Board review of the direction of election; the Board denied the Center's request for review. An election was held on November 17, 2000, and on December 6, 2000, the Regional Director issued a Certification of Representative certifying the Union as the exclusive representative of unit employees for purposes of collective bargaining. The Center sought Board review of the Union's certification; the Board denied the request for review on January 3, 2001. (ER 48.)

By letter dated December 26, 2000, the Union requested that the Center recognize and bargain with it. On January 24, 2001, the Center refused to

recognize or bargain with the Union. The Union filed an unfair labor practice charge regarding the Center's refusal to bargain. The General Counsel issued a complaint. On April 18, 2001, the Board issued a decision granting summary judgment in favor of the General Counsel. The Board's order, among other things, required the Center to bargain on request with the Union and further provided:

> To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the [Center] begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. [350] F.2d 57 (10th Cir. 1965). (ER 48.)

The Center refused to comply with the Board's order. Instead, it filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit. On May 28, 2002, that court issued its order denying the Center's petition and granting the Board's cross-application for enforcement. (ER 43, 48.)

On June 25, 2002, the Union requested information from the Center in preparation for bargaining. The Center supplied the requested information. On August 28, 2002, the Union requested that the Center meet to negotiate on October 1, 2, or 3, 2002. On August 30, 2002, the Center accepted the October 1, 2002 date for the first bargaining session. Pursuant to that agreement, the parties met on

October 1, 2002, in their first face-to-face bargaining session. (ER 43, 48; Tr 392-93, RX 11.)

The parties continued to meet, and bargaining progressed through 22 sessions in the following 11 months. In those sessions, the parties reached tentative agreement on a number of matters contingent upon them reaching a complete agreement. On September 24, 2003, Clinic Manager Terri Hazelton received a document entitled: "Petition to Decertify the Union" dated September 23, 2003, and bearing the signatures of 9 of the 18 unit members. The Center's counsel told the union bargainers that, based on the document, the Center believed the Union did not have the support of a majority of unit employees and that the Center would henceforth refuse to bargain with the Union. (ER 43, 48; GCX 16, RX 8.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing findings of fact, the Board (Chairman Battista and Member Kirsanow; Member Schaumber, dissenting (ER 44 n.7)) concluded that the Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union before expiration of the certification year. (ER 43, 58.) In addition, in light of the Center's failure to file exceptions to the judge's determination, the Board found that the Center violated

Section 8(a)(1) of the Act (29 U.S.C § 158(a)(1)) by counseling and issuing a written warning to employee Jeanette Rerecich.[2] (ER 43, 45-46.)

The Board's Order requires the Center to cease and desist from the unlawful conduct found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Center to rescind the September 2, 2003 counseling and the September 8, 2003 written warning of employee Jeanette Rerecich, to remove any reference to that counseling and warning from its files, and to notify Rerecich in writing that this has been done and that the counseling and written warning will not be used against her in any way. The Order further requires the Center to recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit

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[2] As noted, the Center did not file any exceptions to the administrative law judge's findings that the Center violated the Act by counseling and issuing a written warning to Rerecich. Because the Center did not file any exceptions to that finding, the Board is entitled to enforcement of that portion of its Order. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) ("the Court of Appeals lacks jurisdiction to review . . . objections" that were not raised to the Board). Nonetheless, the Center filed a motion with this Court to supplement the record with evidence of its compliance with the Board's order regarding Rerecich, and argued that the issue is moot. The Board opposed that motion, pointing out that the Center has not even alleged total compliance with that portion of the Board's Order and that, even if it had, compliance does not moot a Board order. The Board maintains that position and seeks enforcement of the Board's Order regarding Rerecich.

as if the initial year of certification has been extended for an additional 6 months from the commencement of bargaining and, if an understanding is reached, embody it in a signed agreement. The Order also requires the posting of an appropriate notice. (ER 45.)

SUMMARY OF ARGUMENT

The Board found that, because the Center withdrew recognition and refused to bargain with the Union during the certification year—the period of time after a union's certification when it is entitled to an irrebuttable presumption of majority status—the Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The only issue in this case is whether the Board acted outside its discretion in applying its well settled principle that, in cases like this, the certification year ends one year after the parties' first negotiating session instead of, as the Center contends, some time earlier.

Specifically, the Center contends that the Union's irrebuttable presumption of majority status should have begun either with the District of Columbia Circuit's initial enforcement of the Board's bargaining order, or with the Center's compliance with the Union's information request. Essentially the same argument has already been rejected by this Court and the Sixth Circuit. Those courts have upheld the Board's rule for commencing the certification year with the onset of face-to-face bargaining, and have rejected claims that the rule improperly shifts the

burden of proof. Although the Center argues that the Board's decision should not be accorded deference, it utterly fails to show that the Board's decision is an impermissible construction of the Act, as would be required under *Chevron*. Nor does the Center address, much less show, why the decisions of this Court and the Sixth Circuit should not be followed.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM AND REFUSING TO BARGAIN WITH THE UNION DURING THE CERTIFICATION-YEAR PERIOD

A. Introduction

In this case, the Center admits (Br 5) that it withdrew recognition and refused to bargain with the Union based on the Center's receipt of a decertification petition on September 24, 2003. The Board found that the Center's withdrawal of recognition, and refusal to bargain on and after September 26, occurred during the certification year in which a union enjoys an irrebuttable presumption of majority support, absent unusual circumstances, not present here. The Center does not contest the basics of the Board's certification-year doctrine as to either its length, or the irrebuttable nature of the presumption of majority status for the full year that arises from a union's initial certification. Rather, the Center only contests the date on which the certification-year period began, contending that it began earlier than

the Board found, and argues that the employees' subsequent decertification petition came after expiration of the certification year. If, as we show below, the Board acted within its discretion in calculating the certification year from the date of the parties' first bargaining session, then, under settled principles, the Center has violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1).

B. The Board's Rule for Commencing the Certification Year with the Start of Face-to-Face Bargaining Is a Reasonable Exercise of the Board's Discretion and Has Been Approved by the Courts

There is no dispute in this case that the Center knew, ever since it tested the validity of the Board's certification of the Union by initially refusing to bargain, that if the Board prevailed the Center was obligated to bargain with the Union for the certification-year period "beginning the date the [Center] begins to bargain in good faith with the Union." (ER 48, see page 5, above.) That requirement was in the Board's unfair labor practice order and, on May 28, 2002, the D.C. Circuit enforced that order against the Center. (*See* ER 54.)

In this aspect of the Board's initial order, the Board was invoking the familiar certification-year rule which holds that, absent "unusual circumstances," a union certified after being chosen by a majority of the employees in a Board-conducted election as their exclusive bargaining representative is granted one year of uninterrupted good-faith bargaining following its certification. During that time, the presumption that the union enjoys continued majority support is

irrebuttable. *See Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952) ("[a] Board certification has thus been held to identify the statutory bargaining agent with certainty and finality, free from challenge as to its majority status, for a period of 1 year, absent unusual circumstances").[3] At the end of the certification year, the presumption continues but becomes rebuttable.[4] *See NLRB v. National Medical Hosp. of Compton*, 907 F.2d 905, 907 (9th Cir. 1990) (and cases cited therein); *NLRB v. Best Products Co.*, 765 F.2d 903, 913 (9th Cir. 1985).

Where an employer honors the Board's certification of a union and voluntarily meets its statutory obligation to bargain, the 12-month certification year commences on the date of the union's certification. *See NLRB v. Lexington*

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[3] The type of "unusual circumstances" contemplated by the rule are illustrated by the three situations specifically referred to by the Supreme Court when it upheld the Board's certification-year rule in *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954): 1) dissolution of the certified union; transfer of substantially all members and officers of the certified union to a new local or international as a result of schism; and 3) radical fluctuation in the size of the bargaining unit within a short time. Each of these is a traumatic occurrence which, totally apart from the employees' continued adherence to the union or the successful progress of negotiations, tend to vitiate entirely the certified union or unit.

[4] If, however, the parties arrive at a contract during the certification year, the union's majority status may not be challenged while a bargaining agreement is in effect or for three years, whichever is less, except during the 90 to 60 day period prior to the contract's expiration. *See Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 488 n.1 (2d Cir. 1975); *BASF-Wyandotte Corp.*, 276 NLRB 498, 504, (1985).

Cartage Co., 713 F.2d 190, 192 (6th Cir. 1983). However, where an employer initially refuses to bargain, the certification year is calculated differently. It runs from the date the employer actually "begins to bargain in good faith" with the union, irrespective of the date of actual certification, as reflected in the order that the D.C. Circuit enforced in this case. (ER 48, 54.) In *Van Dorn Plastic Machinery Co. v. NLRB*, 939 F.2d 402, 404 (6th Cir. 1991), the court specifically approved the Board's rule for commencing the certification year with the onset of face-to-face bargaining in the wake of an employer's pursuit of legal challenges to the certification. The court approved the "face-to-face" rule even though, as here, the employer, prior to the commencement of such bargaining, had complied with the union's information request.

As the Board explained in *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 278 (1990), *enforced*, 939 F.2d 402, 404 (6th Cir. 1991): "If the certification year were to begin when an employer furnishes information, a union could, in effect, be penalized for requesting information prior to negotiations, because that could result in less time for negotiations than if the union had not requested the information." As the Board also observed, the face-to-face bargaining requirement serves to provide the parties with a full certification year by recognizing that when an employer delays honoring a certification after an election, '"some time can reasonably be allowed before the certification year begins for the union to

reestablish contacts with unit employees to facilitate bargaining on their behalf.'" 300 NLRB at 278-79 (quoting *Dominguez Valley Hospital*, 287 NLRB 149, 150 (1987), *enforced sub nom. NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 909 (9th Cir. 1990)).

As this Court observed in *National Medical Hospital*, the Board's rule requiring face-to-face bargaining "encourages employers to commence bargaining promptly." *Id*. at 909. On the other hand, it "is not a rule that can be manipulated by the union unfairly to extend the certification year." The Board has "made clear that it [will] not equate the commencement of the bargaining year with the first bargaining session if there ha[s] been significant delay in the commencement of bargaining attributable to the union." *Id.*

With this qualification, this Court, as well as the Sixth Circuit, have approved the Board's rule for commencing the certification year with the onset of face-to-face bargaining in those cases where the employer initially refuses to bargain in order to test the Board's certification through the unfair labor practice process. *See NLRB v. National Medical Hosp. of Compton*, 907 F.2d 905, 908 (9th Cir. 1990). *See also Van Dorn Plastic Machinery Co. v. NLRB*, 939 F.2d 402, 404 (6th Cir. 1991).

Board rules that implement policies of the Act, such as the certification-year rule itself, as well as when it begins to run, are reviewed under the deferential

standard set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 & n.11 (1984) ("*Chevron*"). Thus, when a statute is silent or ambiguous regarding a rule adopted by an agency, the agency's interpretation is entitled to deference, even if the courts could have reached a different view de novo. *See United Food and Commercial Workers Union, Loc. 1036 v. NLRB*, 307 F.3d 760, 767 (9th Cir. 2002); *NLRB v. Americare-NewLexington Health Care Center*, 124 F.3d 753, 756 (6th Cir. 1997) (applying *Chevron* deference in its review of the Board rule granting certification year after a decertification election).

The Center largely ignores the foregoing precedent in arguing that the Court should set aside the Board's rule for when the certification year begins to run in those circumstances where the employer initially refuses to bargain in order to test the Board's certification through the unfair labor practice process. The Center contends (Br 9, 11) that since it had a right to seek review of the Board's certification of the Union, the date of the court's decision should commence the certification year in order to harmonize it with the rule applicable to voluntary honoring of a union's certification. Alternatively, the Center argues that the Board should start the commencement of the certification year on the date that an employer supplies relevant information in response to a union's request. As shown below, the Center's arguments are meritless on several grounds.

C. The Center Fails To Show that the Board's Rule for Commencing the Certification Year Is Not Owed *Chevron* Deference

In this case, the Center does not and cannot point to any provision of the Act that prescribes the point at which the certification year should begin to run. On the contrary, as the Supreme Court recognized in *Brooks*, whether an event will trigger the commencement of the certification year "is a matter appropriately determined by the Board's administrative authority," and the Board's application should not be set aside by a reviewing court if it is based upon a reasonably defensible construction of the Act. *Brooks*, 348 U.S. 96, 104 (1954). *Accord NLRB v. Holly-General Co., Division of Siegler Corp.*, 305 F.2d 670, 674 (9th Cir. 1962).

The Center's argument (Br 9-16)—that its proposed interpretation of the certification-year rule is better than that of the Board—misses the point of *Chevron* deference. It is the Board, not the courts, and certainly not a private litigant, that is empowered to interpret the Act in the first instance. As such, it is not the court's role to compel adoption of a different rule on a matter committed to the Board's discretion, unless that interpretation is compelled by the Act. *See United Food and Commercial Workers Union, Loc. 1036 v. NLRB*, 307 F.3d 760, 767 (9th Cir. 2002). Thus, it hardly matters that the Center can make a plausible argument in favor of a rule different than that adhered to by the Board, when, as here, the

Center can point to no specific statutory language that would require the Board to adopt the Center's view.

The Center's argument also ignores the fact that this Court, as well as the Sixth Circuit, have already approved the Board's rule regarding commencement of the certification year in this context as a rational, permissible construction of the Act. Although the Center alludes to those cases in its brief, it does not address their holdings nor supply this Court with any basis for departing from that precedent.

D. The Center's Specific Arguments for Rejecting the Board's Rule Are Meritless

As noted, both this Court and the Sixth Circuit have approved the Board's rule, that when the employer initially refuses to bargain in response to the union's certification, the certification year commences with the onset of face-to-face negotiations. As shown, the Sixth Circuit's holding in *Van Dorn* directly rejects the Center's argument that commencement of the certification year should be marked from the employer's compliance with a union's information request. Likewise, this Court's holding in *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990) rejects the Center's assertion that the certification year should begin with a court's rejection of an employer's certification challenge, rather than on the date bargaining starts. As shown below, the Center's assertions

of alleged inconsistencies between the Board's certification-year rule and other principles applied by the Board are without merit.

Initially, there is no inconsistency, as the Center claims (Br 11), between an employer's right to seek review of a Board certification and the Board's rule for when the certification year commences if the employer chooses to test the certification through the unfair labor practice process. In particular, the Board's rule does not equate an employer's seeking court review of a certification with "bad faith" bargaining. On the contrary, the Board's view is that the employer's refusal to honor the certification, at the time the Board initially confers it, has taken from the union the opportunity to bargain during the period when the union is generally at its greatest strength, immediately after an election has been won. *See Mar-Jac Poultry Co.*, 136 NLRB 785, 785-86 (1962). By contrast, after a delay in recognition, a union needs time to restore its relationship with employees. For example, the union must establish contacts with employees who may have been hired into the unit since the Board's certification but before the employer supplied any contact information for new hires because of its refusal to recognize the union. The union also might have to reconstruct a bargaining committee in light of employee turnover, or rethink its bargaining goals to reflect the interests of current unit members. *See Dominguez Valley Hospital*, 287 NLRB 149, 150 (1987) (noting that when an employer delays recognition of a union some time must be

allowed for union to reestablish contact with employees), *enforced sub nom. NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990).[5]

Contrary to the Center's further contention (Br 16-19), the Board's rule does not unduly impair employee free choice. As the District of Columbia Circuit has observed: some impairment of employee choice "is the inevitable by-product of the Board's" adoption of such rules as the certification-year rule, as well as the contract bar rule, where the Board properly is "striking a balance between stability and employee free choice in labor relations, as it frequently must do." *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002).

The Center fares even less well in arguing (Br 13-16) that an employer's compliance with a union's information request should start the running of the certification year in those situations where the employer did not immediately honor a union's certification. As noted, that position was explicitly rejected by the court in *Van Dorn Plastic Machinery Co. v. NLRB*, 939 F.2d 402, 404 (6th Cir. 1991).

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[5] The Center counters (Br 10) that "[i]f anything, a union may be better prepared for bargaining following review of the certification order because it has had additional opportunity to work with employees and study workplace issues during the review process." But the Center's point overlooks the fact that, once a union knows its certification is being subjected to legal challenge, the union may well decide not to allocate further resources toward keeping on top of developments in the challenged unit until it knows that court review has upheld its authority to represent the employees.

There, the court, citing this Court's holding in *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 909 (9th Cir. 1990), found that it was a reasonable exercise of the Board's discretion to start the running of the certification year with actual face-to-face bargaining, rather than employer compliance with a union's information request. In upholding the Board's rule, the court necessarily rejected the contention, urged by the Center here, that such a rule is irrational. As *Van Dorn* teaches, merely because the Board holds that compliance with relevant information requests is part of the duty to bargain does not require the Board to use such compliance for the purpose of commencing the certification year.

The Center's claim (Br 16) that the "illogic and inconsistency of the Board's definition of 'bargaining' precludes deference" is not well founded. In this case, as in other certification-year cases, the Board is not just looking for the presence of the first activity that falls within statutory duty to bargain. Rather, the Board's choice of when to begin the running of the certification year is an exercise of the Board's remedial discretion; the Board imposes this remedy whenever an unfair labor practice decision is needed to compel an employer to honor the Board's initial certification of the union. As such, "[a]dditional calendar time is added to make up a 'reasonable period [for bargaining],' and many factors go into that determination." *Van Dorn*, 939 F.2d at 404. *See also NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 909 (9th Cir. 1990) (recognizing the Board's

authority to interpret its initial order requiring good faith bargaining as commencing with the first actual meeting between the parties).

The Center also wrongly attacks (Br 19-22) the Board's rule on the ground that it is arbitrary and unworkable because the Board has built in the following exception to the rule: The beginning of the certification year need not await face-to-face bargaining whenever the union has engaged in inexcusable procrastination. To the contrary, it was precisely this exception to the rule that led the Court in *National Medical Hospital*, 907 F.2d at 909, to favorably remark that "this is not a rule that can be manipulated by the union unfairly to extend the certification year[,]" and, in part, led the Court to approve the requirement of actual bargaining as the trigger for the certification year. *Id.* at 909. *Accord Van Dorn*, 939 F.2d at 405.

Moreover, contrary to Center's contention (Br 19-20), the Board did explain the factors that led it to conclude that the 4-month period—between the D.C. Circuit's decision enforcing the Board's bargaining order and the first bargaining session—did not reflect inexcusable procrastination. The Board noted "there was nearly a year-and-a-half delay from certification until the court of appeals enforced the Board's bargaining order." (ER 43.) Then, "[l]ess than a month later, the Union requested information it needed for bargaining; and it sought bargaining within 2 months of receiving the requested information." *Id.* At that point, "[t]he

Center accepted the first bargaining date that the Union suggested . . . [without] complain[ing] about delay or request[ing] an earlier bargaining date." (ER 43-44.) The Board reasonably concluded there was "no evidence of bad faith on the Union's part" and, although "[f]our months passed from the court's enforcement of the bargaining order to the start of bargaining; . . . [that was not an] inexcusably long [period] to formulate information requests, to assimilate the information received, to reestablish contacts with unit employees, and to otherwise prepare for bargaining an initial contract." (ER 43-44.) Hence, by any measure, the Board gave a reasoned explanation of the factors, both generally and under the specific circumstances of this case, that determine whether a union has engaged in inexcusable procrastination. [6]

Finally, the Center makes two procedural arguments that are not well founded. First, it claims (Br 24) that the Board has improperly required "the

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[6] The clarity of the Board's rule regarding the start of the certification year and the Board's well-reasoned analysis of the circumstances bearing on an inexcusable-procrastination claim refutes the Center's contention (Br 22-23) that Board law is so vague as to leave an employer rudderless in determining whether the first face-to-face bargaining session starts the running of the certification year.

employer to prove an element of the unfair labor practice charged—i.e., that its withdrawal of recognition occurred outside the insulated period because the Union's procrastination was inexcusable." The Center confuses the elements of the unfair labor practice violation, which the Board's General Counsel proved, with an affirmative defense that the Center may have had to that violation.

The Board's General Counsel proved that the Center withdrew recognition within the year following the parties' first face-to-face bargaining session. Under settled law, that conduct alone proves a violation of the Act in the circumstances of cases like this one "when the certification year is interrupted by the refusal of the employer to bargain." *Van Dorn Plastic Machinery Co. v. NLRB*, 939 F.2d 402, 404 (6th Cir. 1991).

Nonetheless, Board law provides an affirmative defense to an employer who has withdrawn recognition within the year following the parties' first face-to-face bargaining session. An employer can escape liability for withdrawing recognition during that period by showing that using the first face-to-face bargaining session begins the certification year too late, because the union has engaged in inexcusable procrastination that unduly delayed that first face-to-face bargaining. *See NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 909 (9th Cir. 1990). As the Board here noted (ER 56), this argument is an "affirmative defense." As such, the party raising the '"affirmative defense at trial presumably must bear the burden of

going forward with evidence' to prove [that defense]." *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185 n.5 (D.C. Cir. 2006) (citation omitted). *See NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 909 (9th Cir. 1990) ("Here, the Board looked at the *evidence proffered by the employer* [as to whether the union engaged in significant delay] and saw no evidence of bad faith.") (emphasis added)).

The Center's second procedural argument fails for the same reason. The Center argues (Br 27-29) that if the Board is going to impose upon it the burden of going forward with evidence on the issue of union procrastination, the Board is in effect announcing a new rule that should be announced by rulemaking and not in this adjudication. But once it is understood that the issue of union procrastination is properly characterized as affirmative defense, the party asserting that defense is always on notice that it must bear the burden of going forward with evidence to prove that defense. *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185 n.5 (D.C. Cir. 2006).

In any event, even assuming the Center was not aware that an employer bears the burden when it advances the affirmative defense of union procrastination, the Center has never suggested that there is any evidence which the Board did not consider and that would show that the Board wrongly decided this issue. *See NLRB v. Tahoe Vangas, Inc.*, 517 F.2d 747, 749 (9th Cir. 1975) (where "[n]o

surprise or prejudice was suggested and no continuance was requested[,]" employer could not show a denial of due process).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Center's petition for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
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	)	
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	)	
v.	)	Board Case No.
	)	19-CA-29046
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,642 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 15th day of February 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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